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South San Francisco Police Department, and  
7 Mark Raffaelli

8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA

11 HOWARD ZIMMERMAN and WILLIAM  
12 CARTER,

13 Plaintiffs,

14 v.

15 CITY OF SOUTH SAN FRANCISCO,  
SOUTH SAN FRANCISCO POLICE  
16 DEPARTMENT, MARK RAFFAELLI, and  
DOES 1 through 10, inclusive,

17 Defendants.

Case No. C073623 WHA  
ANSWER TO COMPLAINT

Complaint Filed: July 13, 2007

18 Defendants City of South San Francisco ("City"), the City of South San Francisco  
19 Police Department ("Department"), and Mark Raffaelli ("Chief Raffaelli") hereby answer and  
20 respond to the unverified Complaint in the above-captioned matter ("Complaint"), filed in  
21 this Court on July 13, 2007, as follows:

22 1. Responding to the allegations contained in paragraph 1 of the Complaint,  
23 Defendants admit the allegations contained therein.

24 2. Responding to the allegations contained in paragraph 2 of the Complaint,  
25 Defendants admit the allegations contained therein.

26 3. Responding to the allegations contained in paragraph 3 of the Complaint,  
27 Defendants admit the allegations contained therein.

28 4. Responding to the allegations contained in paragraph 4 of the Complaint,

1 Defendants admit the allegations contained therein.

2 5. Responding to the allegations contained in paragraph 5 of the Complaint,  
3 Defendants admit the allegations contained therein.

4 6. Responding to the allegations contained in paragraph 6 of the Complaint,  
5 Defendants deny the allegations contained therein.

6 7. Responding to the allegations contained in paragraph 7 of the Complaint,  
7 Defendants deny the allegations contained therein.

8 8. Responding to the allegations contained in paragraph 8 of the Complaint,  
9 Defendants admit that plaintiffs are bringing this lawsuit under the statutes identified  
10 therein.

11 9. Responding to the allegations contained in paragraph 9 of the Complaint,  
12 Defendants admit that this Court appears to have jurisdiction over this lawsuit based on the  
13 statutes identified therein.

14 10. Responding to the allegations contained in paragraph 10 of the Complaint,  
15 Defendants admit that venue appears proper in this Court based on the statutes identified  
16 therein.

17 11. Responding to the allegations contained in paragraph 11 of the Complaint,  
18 Defendants admit the allegations contained therein.

19 12. Responding to the allegations contained in paragraph 12 of the Complaint,  
20 Defendants deny the allegations contained therein.

21 13. Responding to the allegations contained in paragraph 13 of the Complaint,  
22 Defendants lack sufficient information or knowledge to enable them to form a belief  
23 regarding the truth of the allegations contained therein and, on that basis, deny each of the  
24 allegations contained therein.

25 14. Responding to the allegations contained in paragraph 14 of the Complaint,  
26 Defendants lack sufficient information or knowledge to enable them to form a belief  
27 regarding the truth of the allegations contained therein and, on that basis, deny each of the  
28 allegations contained therein.

1           15.     Responding to the allegations contained in paragraph 15 of the Complaint,  
2 Defendants lack sufficient information or knowledge to enable them to form a belief  
3 regarding the allegations contained in the first sentence and, on that basis, deny each of  
4 the allegations contained therein. Defendants deny the allegations contained in the second  
5 sentence.

6           16.     Responding to the allegations contained in paragraph 16 of the Complaint,  
7 Defendants admit that Plaintiff Zimmerman communicated to the City an interest in  
8 participating in the upcoming examination for sergeant in February 2006, that the City  
9 proceeded with the promotional exam, and that the City selected another officer for the  
10 sergeant position. Defendants deny the remaining allegations contained in paragraph 16.

11           17.     Responding to the allegations contained in paragraph 17 of the Complaint,  
12 Defendants deny each and every allegation contained therein.

13           18.     Responding to the allegations contained in paragraph 18 of the Complaint,  
14 Defendants deny each and every allegation contained therein.

15           19.     Responding to the allegations contained in paragraph 19 of the Complaint,  
16 Defendants deny each and every allegation contained therein.

17           20.     Responding to the allegations contained in paragraph 20 of the Complaint,  
18 Defendants admit the allegations contained therein.

19           21.     Responding to the allegations contained in paragraph 21 of the Complaint,  
20 Defendants deny each and every allegation contained therein.

21           22.     Responding to the allegations contained in paragraph 22 of the Complaint,  
22 Defendants lack sufficient information or knowledge to enable them to form a belief  
23 regarding the allegations contained therein and, on that basis, deny each and every of the  
24 allegations contained therein.

25           23.     Responding to the allegations contained in paragraph 23 of the Complaint,  
26 Defendants lack sufficient information or knowledge to enable them to form a belief  
27 regarding the allegations contained therein and, on that basis, deny each and every of the  
28 allegations contained therein.

1           24.    Responding to the allegations contained in paragraph 24 of the Complaint,  
2 Defendants deny each and every allegation contained therein.

3           25.    Responding to the allegations contained in paragraph 25 of the Complaint,  
4 Defendants deny each and every allegation contained therein.

5           26.    Responding to the allegations contained in paragraph 26 of the Complaint,  
6 Defendants admit that Plaintiff Carter communicated to the City an interest in participating  
7 in the upcoming examination for lieutenant in January 2006, that the City proceeded with  
8 the promotional exam, and that the City selected two officers for the lieutenant position over  
9 a period of a year. Defendants lack sufficient information or knowledge to enable them to  
10 form a belief regarding the truth of the allegations contained in the first two sentences of  
11 paragraph 26. Defendants deny the remaining allegations contained therein.

12          27.    Responding to the allegations contained in paragraph 27 of the Complaint,  
13 Defendants deny each and every allegation contained therein.

14          28.    Responding to the allegations contained in paragraph 28 of the Complaint,  
15 Defendants deny each and every allegation contained therein.

16          29.    Responding to the allegations contained in paragraph 29 of the Complaint,  
17 Defendants incorporate their responses to the previous paragraphs 1-28 in the Complaint  
18 as though fully set forth herein.

19          30.    Responding to the allegations contained in paragraph 30 of the Complaint,  
20 Defendants respond that the statutes cited speak for themselves.

21          31.    Responding to the allegations contained in paragraph 31 of the Complaint,  
22 Defendants deny each and every allegation contained therein.

23          32.    Responding to the allegations contained in paragraph 32 of the Complaint,  
24 Defendants deny each and every allegation contained therein.

25          33.    Responding to the allegations contained in paragraph 33 of the Complaint,  
26 Defendants deny each and every allegation contained therein.

27          34.    Responding to the allegations contained in paragraph 34 of the Complaint,  
28 Defendants deny each and every allegation contained therein.

1           35.     Responding to the allegations contained in paragraph 35 of the Complaint,  
2 Defendants incorporate their responses to the previous paragraphs 1-34 in the Complaint  
3 as though fully set forth herein.

4           36.     Responding to the allegations contained in paragraph 36 of the Complaint,  
5 Defendants respond that the statutes cited speak for themselves.

6           37.     Responding to the allegations contained in paragraph 37 of the Complaint,  
7 Defendants deny each and every allegation contained therein.

8           38.     Responding to the allegations contained in paragraph 38 of the Complaint,  
9 Defendants deny each and every allegation contained therein.

10          39.     Responding to the allegations contained in paragraph 39 of the Complaint,  
11 Defendants deny each and every allegation contained therein.

12          40.     Responding to the allegations contained in paragraph 40 of the Complaint,  
13 Defendants incorporate their responses to the previous paragraphs 1-39 in the Complaint  
14 as though fully set forth herein.

15          41.     Responding to the allegations contained in paragraph 41 of the Complaint,  
16 Defendants respond that the statutes cited speak for themselves.

17          42.     Responding to the allegations contained in paragraph 42 of the Complaint,  
18 Defendants deny each and every allegation contained therein.

19          43.     Responding to the allegations contained in paragraph 43 of the Complaint,  
20 Defendants deny each and every allegation contained therein.

21          44.     Responding to the allegations contained in paragraph 44 of the Complaint,  
22 Defendants deny each and every allegation contained therein.

23          45.     Responding to the allegations contained in paragraph 45 of the Complaint,  
24 Defendants deny each and every allegation contained therein.

25 [NOTE: From this point forward, the Complaint's paragraphs are misnumbered, starting  
26 with paragraph 35 again.]

27          35. [sic]     Responding to the allegations contained in paragraph 35 [sic] of the  
28 Complaint, Defendants incorporate their responses to the previous paragraphs 1-45 in the

1 Complaint as though fully set forth herein.

2 36. [sic] Responding to the allegations contained in paragraph 36 [sic] of the  
3 Complaint, Defendants respond that the statutes cited speak for themselves.

4 37. [sic] Responding to the allegations contained in paragraph 37 [sic] of the  
5 Complaint, Defendants deny each and every allegation contained therein.

6 38. [sic] Responding to the allegations contained in paragraph 38 [sic] of the  
7 Complaint, Defendants deny each and every allegation contained therein.

8 39. [sic]. Responding to the allegations contained in paragraph 39 [sic] of the  
9 Complaint, Defendants deny each and every allegation contained therein.

10 Responding to the prayer for relief set forth at page 11, lines 11-27 and page 12,  
11 lines 1-17, Defendants deny that Plaintiffs are entitled to any of the relief requested or any  
12 relief whatsoever.

13 AS AND FOR THEIR AFFIRMATIVE DEFENSES TO THE CAUSES OF ACTION  
14 PURPORTED TO BE SET FORTH AGAINST THEM IN THE COMPLAINT HEREIN, THE  
15 DEFENDANTS ALLEGE AS FOLLOWS:

16 **FIRST AFFIRMATIVE DEFENSE**

17 1. Plaintiffs fail to state facts sufficient to constitute a cause of action for violation  
18 of 38 U.S.C. § 4311 *et seq* (USERRA) against any of the Defendants.

19 **SECOND AFFIRMATIVE DEFENSE**

20 2. Plaintiffs fail to state facts sufficient to constitute a cause of action for violation  
21 of California Military & Veterans Code § 394 *et seq* against any of the Defendants.

22 **THIRD AFFIRMATIVE DEFENSE**

23 3. Plaintiffs fail to state a cause of action for hostile work environment in  
24 violation of USERRA as a matter of law.

25 **FOURTH AFFIRMATIVE DEFENSE**

26 4. Plaintiffs' claims, and each of them, against South San Francisco Police  
27 Department are barred because South San Francisco Police Department is not a  
28 separately suable entity.

**FIFTH AFFIRMATIVE DEFENSE**

5. Plaintiffs fail to state facts sufficient to constitute a cause of action for violation of USERRA against Defendant Raffaelli because he is not an "employer" within the meaning of USERRA.

**SIXTH AFFIRMATIVE DEFENSE**

6. All of Plaintiffs' causes of action are barred by the doctrine of laches.

**SEVENTH AFFIRMATIVE DEFENSE**

7. Plaintiffs' causes of action are barred due to their failure to comply, and to allege compliance, with the California Government Tort Claims Act claim presentation requirements.

**EIGHTH AFFIRMATIVE DEFENSE**

8. Plaintiffs' claims under USERRA and the Military & Veterans Code are barred due to their failure to exhaust administrative remedies.

**NINTH AFFIRMATIVE DEFENSE**

9. Plaintiffs' claims, and each of them, are barred by the privileges and immunities applicable to public employees and agencies, including but not limited to California Government Code §§ 815.2, 815.6, 818.2, 820.2, 820.4, 820.6, 820.8, 821, 821.6, and 822.2.

**TENTH AFFIRMATIVE DEFENSE**

10. Plaintiffs' claims, and each of them, are barred by the applicable statutes of limitations.

**ELEVENTH AFFIRMATIVE DEFENSE**

11. Defendants had legitimate, nondiscriminatory reasons, which were not pretext for discrimination, for taking the personnel actions they took related to Plaintiffs.

**TWELFTH AFFIRMATIVE DEFENSE**

12. If Plaintiffs were entitled to recover for any loss suffered or sustained at the times alleged, although such is not admitted hereby or herein, then the total amount of damage to which Plaintiffs would otherwise be entitled shall be reduced in proportion to the



1 amount of negligence attributable to Plaintiffs and which negligence directly and  
2 proximately contributed to Plaintiffs' loss or damage herein alleged.

3 **THIRTEENTH AFFIRMATIVE DEFENSE**

4 13. If Plaintiffs were entitled to recover for any loss suffered or sustained at the  
5 times alleged, although such is not admitted hereby or herein, then the total amount of  
6 damage to which Plaintiffs would otherwise be entitled shall be limited by after-acquired  
7 evidence of misconduct which would have resulted in discipline, through termination.

8 **FOURTEENTH AFFIRMATIVE DEFENSE**

9 14. At all times mentioned in the Complaint, Defendants acted in conformity with  
10 applicable law, regulation, and policy.

11 **FIFTEENTH AFFIRMATIVE DEFENSE**

12 15. Plaintiffs' alleged injuries, losses, or damages were proximately caused by a  
13 superseding and intervening cause.

14 **SIXTEENTH AFFIRMATIVE DEFENSE**

15 16. If Plaintiffs suffered or sustained any loss, damage or injury at or about the  
16 times and places alleged, although such is not admitted hereby or herein, the same or the  
17 direct and proximate result of the risk, if any risk there was, was knowingly assumed by  
18 Plaintiffs.

19 **SEVENTEENTH AFFIRMATIVE DEFENSE**

20 17. Plaintiffs are not entitled to injunctive relief because they each have adequate  
21 legal remedies.

22 **EIGHTEENTH AFFIRMATIVE DEFENSE**

23 18. Plaintiffs are not entitled to an award of attorneys' fees.

24 **NINETEENTH AFFIRMATIVE DEFENSE**

25 19. Plaintiffs' claims of emotional distress are barred by the exclusivity provisions  
26 of the Workers' Compensation laws.

27 **TWENTIETH AFFIRMATIVE DEFENSE**

28 20. If the Defendants did subject Plaintiffs to any wrongful or unlawful conduct



1 resulting in mental, physical or emotional harm, although such is not admitted hereby,  
2 Plaintiffs had a duty to mitigate any damages they may have suffered by seeking medical  
3 and psychological treatment and Plaintiffs have failed to do so.

4 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

5 21. Plaintiffs had a duty, but failed, to mitigate any damages to which they may be  
6 entitled.

7 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

8 22. Plaintiffs' claims are barred by unclean hands.

9 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

10 23. Plaintiffs' claim for injunctive relief is moot.

11 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

12 24. Plaintiffs' claims, and each of them, are moot because the sought-for relief  
13 has already been granted.

14 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

15 25. Plaintiffs' claims are barred by waiver and estoppel.

16 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

17 26. Plaintiffs' claims are barred by contractual agreement.

18 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

19 27. Plaintiffs fail to state facts sufficient to constitute a cause of action because  
20 plaintiffs did not suffer an "adverse employment action."

21 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

22 28. Plaintiffs lack standing to bring these claims, and each of them.

23 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

24 29. Liquidated damages should not be awarded because none of the alleged  
25 wrongful acts by defendants were willful.

26 **THIRTIETH AFFIRMATIVE DEFENSE**

27 30. Plaintiffs' claims are barred because they are not ripe for adjudication.  
28

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

31. Plaintiffs fail to state facts sufficient to constitute a cause of action for hostile work environment because the alleged conduct is neither severe nor pervasive and did not alter the terms or conditions of plaintiffs' employment.

WHEREFORE, Defendants pray for judgment as follows:

1. That judgment be awarded for Defendants;
2. That Plaintiffs take nothing by their Complaint;
3. That Defendants be awarded their costs incurred herein, including attorneys' fees; and
4. That the Court order such other and further relief for these answering Defendants as the Court may deem just and proper.

Dated: August 8, 2007

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: Terry Roemer  
Terry Roemer  
Attorneys for Defendants City of South San  
Francisco, South San Francisco Police  
Department, Mark Raffaelli

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PROOF OF SERVICE

I am employed in the City of Oakland and County of Alameda, California. I am over the age of 18 years and not a party to the within action. My business address is Meyers, Nave, Riback, Silver & Wilson, 555 12<sup>th</sup> Street, Suite 1500, Oakland, California 94607.

On August 8, 2007 I served the following document(s):

ANSWER TO COMPLAINT

on the parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Daniel M. Crawford  
Attorney at Law  
44 Montgomery Street, Suite 1050  
San Francisco, California 94104  
Telephone: (415) 433-1442  
Facsimile: (415) 986-4056

  X   (BY FIRST-CLASS MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Oakland, California. I am readily familiar with the business practice for collection and processing of mail in this office; and that in the ordinary course of business said document would be deposited with the U.S. Postal Service in Oakland on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this declaration.

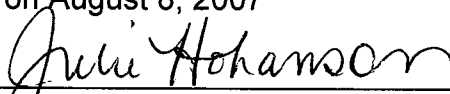
       (BY PERSONAL SERVICE) I caused each such envelope to be delivered by hand to the offices of each addressee above.

       (BY OVERNIGHT MAIL) I caused each such envelope to be delivered overnight via Federal Express in lieu of delivery by mail to the offices of each addressee above – TRACKING No. 790601609346

       (BY FACSIMILE) I caused said document(s) to be sent by facsimile machine number indicated above. The transmission originated from facsimile machine number (510) 444-1108, and was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at Oakland, California, on August 8, 2007

  
Julie Hokanson